

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:

Case No.: 04-34681

Chapter: 7

James E. and Linda L. Augustin,

Debtors

**RESPONSE TO OBJECTION TO
PROPERTY CLAIMED EXEMPT**

1. The above-named debtors through the undersigned attorney submit this response to the Trustee's Notice of Motion and Motion Objecting to Claimed Exemption, scheduled for hearing on October 20, 2004 at 2:30 p.m.
2. This is a core proceeding. The Bankruptcy Court has jurisdiction to determine the matter pursuant to 28 U.S.C. §§157 and 1334 and this motion is properly before the Court pursuant to Bankruptcy Rule 5005 and LR 1070-1. The Bankruptcy Case is currently pending before this Court.
3. Pursuant to LR 9013-2 (b), Debtors request an order denying the objection to Debtors' claim of exemption of a personal injury claim as it relates to general damages and post-petition special damages.
4. The attached affidavit of James Augustin and memorandum of law are incorporated by reference.

Dated: 10/07/04

CHRISTIAN & PETERSON, P.A.

By: /e/ Kevin Siefken
Kevin H. Siefken
Attorney ID No.: 260745
314 South Broadway Ave.
Albert Lea, MN 56007
(507) 373-2345
Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:

Case No.: 04-34681

Chapter: 7

James E. and Linda L. Augustin,

Debtors

**AFFIDAVIT OF
JAMES AUGUSTIN**

James Augustin, being first duly sworn and upon oath, deposes and says:

1. I am one of the debtors in the above matter. I make this affidavit upon my own knowledge and as to matters to which I am competent to testify.
2. Attached hereto and marked as Exhibit A is a true and correct copy of the Complaint in my personal injury action against Annett Holdings, Inc. This is a complaint for injuries to my person resulting from my fall on negligently constructed stairs. This is currently set for trial in December.
3. All or nearly all of my medical bills have been paid by insurance.
4. I do not know what my claim is worth.
5. Although insurance has paid my medical expenses, there is a subrogation interest that they have asserted in the amount of approximately \$18,000.
6. At the time of the injury, I was not working. Lost wages do not factor into my claim. Although the complaint requests lost wages, it is my understanding that my claim consists of pain and suffering, and future medical expenses, along with a very small possible claim for past medical expenses.

Further your affiant sayeth not.

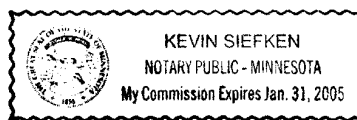
Date: 10-6-04

Signed: James E. Augustin
James E. Augustin

Subscribed and sworn to before me
this 6th day of October, 2004.

[Signature]

Notary Public



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Kauffman Law Firm

(507)285-5165

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JAMES AUGUSTIN and LINDA
AUGUSTIN,

Plaintiffs

vs.

ANNETT HOLDINGS, INC. d/b/a
BEST INNS & SUITES

Defendant


LAW NO. 93389

ORIGINAL NOTICE

TO THE ABOVE NAMED DEFENDANTS:

You are hereby notified that there is now on file in the office of the Clerk of the above Court a Petition in the above-entitled action, a copy of which Petition is attached hereto. The Plaintiff's attorneys are Kreg A. Kauffman, Kauffman Law Firm, whose address is Suite 302 Ironwood Square, 300 Third Avenue S.E., PO Box 338, Rochester, MN 55903-0338.

You are further notified that unless, within 20 days after service of this Original Notice upon you, you serve, and within a reasonable time thereafter file, a written special appearance motion or answer, in the Iowa District Court for Polk County, at the Courthouse at 500 Mulberry in Des Moines, Iowa, judgment by default will be rendered against you for the relief demanded in the Petition.


CLERK OF THE ABOVE COURT
Polk County Courthouse
500 Mulberry
Des Moines, Iowa 50309

NOTE: The attorney who is expected to represent the Defendants should be promptly advised by Defendants of the service of this notice.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JAMES AUGUSTIN and LINDA
AUGUSTIN,

Plaintiffs

vs.

ANNETT HOLDINGS, INC. d/b/a
BEST INNS & SUITES

Defendant

LAW NO. _____

PETITION AT LAW AND
JURY DEMAND

FILED
JUN 29 2004
CLERK OF DISTRICT COURT
POLK COUNTY, IOWA

COMES NOW Plaintiffs, James Augustin and Linda Augustin, and for their cause of action against Defendant, states as follows:

1. Plaintiffs James Augustin and Linda Augustin are residents of Austin, Mower County, Minnesota.

2. On information and belief, Defendant Annett Holdings, Inc. is a corporation organized under the laws of the State of Iowa and owned and operated a hotel known as Best Inns & Suites (Best Inns) located at 6221 Army Post Road in Des Moines, Polk County, Iowa.

3. On or before April 27, 2002, the southwest exit stairway of the Best Inns was in violation of applicable building standards and guidelines including the Uniform Building Code, and these violations constitute a dangerous and unsafe condition in the following particulars:

- a. There were no handrails present on the stairway.
- b. There was excessive variation in riser height between the risers.

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c. There was excessive variation in tread length between the treads.

d. There was excessive slopes on both treads and on the top surface of the curb that adjoins the bottom tread.

e. The landing and tread surfaces blend together visually, making it difficult to distinguish the edges of the steps.

4. As a direct result of these violations of the applicable building standards and guidelines including the Uniform Building Code, guests of the Best Inns including Plaintiff James Augustin were required to use the southwest exit stairway of the Best Inns without proper safety precautions.

5. On or about April 27, 2002, Plaintiffs James Augustin and Linda Augustin attended a conference at and were overnight guests of the Best Inns.

6. On or about April 27, 2002, Plaintiff James Augustin checked out of the Best Inns and was leaving the hotel by the southwest exit stairway. As Plaintiff James Augustin approached the stairway, his left foot slipped off the top step causing him to fall sideways down the stairs landing on his right leg.

7. Defendant Best Inns is the owner of the premises, including the southwest exit stairway, and has a duty to construct and maintain its premises in a safe condition and in compliance with the applicable building standards and guidelines, including the Uniform Building Code. Defendant

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Best Inns breached this duty to Plaintiff James Augustin by failing to construct and maintain its premises in compliance with the applicable building standards and guidelines including the Uniform Building Code.

8. In addition, Defendant Best Inns failed to use reasonable care to warn its guests, including Plaintiff James Augustin, of the dangerous and unsafe condition of the premises caused by its failure to construct and maintain the premises in compliance with the applicable building guidelines including the Uniform Building Code.

9. As a direct result of Defendant's failure to use reasonable care by failing to construct and maintain its premises in compliance with applicable building standards and guidelines including the Uniform Building Code and by failing to warn its guests including Plaintiff James Augustin of the dangerous and unsafe condition of the premises, Plaintiff James Augustin suffered severe and permanent injuries including but not limited to a rupture of his right quadriceps tendon which required surgical open repair of the right quadriceps tendon.

10. As a direct result of Defendant's negligence in failing to construct and maintain its premises in compliance with applicable building standards and guidelines including the Uniform Building Code and in failing to warn its guests including Plaintiff James Augustin of the dangerous and unsafe condition of the premises, Plaintiff James Augustin was caused to incur in the past and will incur in the future

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medical expenses, was caused to incur lost income and will in the future incur lost income and lost earning capacity, and has suffered pain and suffering in a total amount in excess of \$50,000.00.

11. At all times material herein Plaintiffs James Augustin and Linda Augustin were husband and wife.

12. As a direct result of Defendant's negligence in failing to construct and maintain its premises in compliance with applicable building standards and guidelines including the Uniform Building Code and in failing to warn its guests including Plaintiff James Augustin of the dangerous and unsafe condition of the premises, Plaintiff Linda Augustin has lost or had diminished the services and companionship of James Augustin, which she would have received in the normal course of their married life, the amount of which is undetermined at this time.

WHEREFORE, Plaintiffs James Augustin and Linda Augustin demand judgment against Defendant in an amount in excess of \$50,000.00, together with interest at the legal rate and costs and disbursements herein.

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JURY DEMAND

Plaintiffs James Augustin and Linda Augustin hereby demand a trial by jury of all of the fact issues herein.

Dated: *September 19, 2003*

KAUFFMAN LAW FIRM

By: 

Kreg A. Kauffman
Attorney for Plaintiffs
302 Ironwood Square
300 Third Avenue S.E.
P.O. Box 338
Rochester, MN 55903-0338
507-285-5350
Attorney Reg. No: 7779

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:

Case No.: 04-34681

Chapter: 7

James E. and Linda L. Augustin,

Debtors

**MEMORANDUM IN
OPPOSITION TO TRUSTEE'S
OBJECTION TO EXEMPTION**

INTRODUCTION

The Debtors, James and Linda Augustin submit this memorandum in opposition to the Trustee's objection to their claim of exemption. The Debtor was injured when he fell down a flight of stairs in a hotel. (Augustin Affidavit Exhibit A).

At the time of the injury, James Augustin was not working. (Augustin Affidavit). Although the complaint states past lost income, it is not likely that Mr. Augustin can prevail on a claim for past lost income, as he was not working.

Although medical expenses were incurred, those were almost entirely paid by insurance. The insurance company asserts a subrogation of interest of approximately \$18,000. The matter is set for trial in December.

The trustee objects to the Debtors' claim that this cause of action is exempt. The Debtors have amended their exemption to include only those portions of the claim for which they can claim a valid exemption following In Re: Bailey, 84 B.R. 608 (Apr. 8, 1988). The trustee's motion as it relates to this amended exemption should be denied.

ARGUMENT

The Debtors should be allowed to claim the personal injury action as exempt pursuant to Minn. Stat. §550.37 subd. 22 to the extent that the claim includes general damages and special damages that arose or may arise after filing of the bankruptcy petition. Debtors have elected the Minnesota exemptions. Under those exemptions, “rights of action for injuries to the person of the debtor or of a relative whether or not resulting in debt” are exempt. Minn. Stat. §550.37 subd. 22. That statute has been determined constitutional to the extent that it encompasses general damages and future special damages for bodily injury. Medill v. State of Minnesota, 477 N.W.2d 703 (Minn. 1991). In dicta, the court opined that it would likely not uphold past special damages¹, because they would reimburse an individual for expenses that would ordinarily be discharged in bankruptcy, creating a windfall to the debtor. Id. at 706.

The Minnesota Supreme Court based its holding in part upon In Re: Bailey, 84 B.R. 608 (Apr. 8, 1988). In Bailey, this Court listed the items included in the concept of “general damages and the items generally included in the term “special damages.” Id. at 610. “Rights of action for personal injury typically include the following elements of claimed general damages: Temporary or permanent physical and mental loss or impairment, including lost future earning capacity; pain and suffering, including that reasonably certain to occur in the future; mental suffering, including that reasonably certain to occur in the future; and future

¹The terms past and future damages may have different meanings whether used in the context of personal injury actions or bankruptcy proceedings. For purposes of this memorandum, the point in time separating past from future damages is the date of bankruptcy filing, rather than the date of service of the summons and petition in the underlying personal injury claim.

medical costs reasonably certain to occur.” Id. Conversely, special damages include the following: existing medical costs; actual lost income; existing non-medical costs and expenses; and property lost, damaged or destroyed in the incident that caused the injury.” Id. The Court further noted “special damage claims suffered post-petition, such as lost wages and medical expenses, should be considered to be property interests in the right of action that vests in the debtor - not the estate in a Chapter 7 case. Accordingly, regarding such interests, exemption is unnecessary, and, in any event inapplicable.” Id. at 611, fn. 4. Bailey analyzed a personal injury action in three parts: (1) pre-petition special damages; (2) post-petition special damages; and (3) general damages.

The Trustee objects to the exemption entirely. To the extent that this objection includes pre-petition special damages, the Debtors do not dispute this. However small this portion of the claim may be in this case, the bankruptcy estate holds an interest.

With respect to general damages, there is no question that this exemption is valid. Both this court and the Minnesota Supreme Court have stated that claims for general damages can never constitute an unreasonable amount of property for purposes of exemption. Medill, 477 N.W.2d at 706; In Re: Bailey, 84 B.R. at 611.

Finally, the debtors’ interest in post-petition special damages is exempt. The Medill court did not devote significant analysis to the issue of post-petition special damages. However, the Court considered the following certified question: “Does Minn. Stat. §550.37 subd. 22 (1990), which exempts “rights of action for injuries to the person of the debtor or of a relative” from attachment, garnishment or sale on any final process issued from any court;

Contravene Art.1, §12 of the Minnesota Constitution as applied in the case of general damages and future special damages awarded to a debtor for bodily injury?” Medill, 477 N.W.2d at 704. The Medill Court answered the question in the negative.

The Bailey Court described post-petition damages in two different ways. First, in defining general damages, the Court included lost future earning capacity and future medical costs reasonably certain to occur. Bailey, 84 B.R. at 610. Further, whether such damages are characterized as future special damages or general damages makes little difference, as such items should be considered to be property interests in the right of action that vests in the debtor rather than in the estate in a Chapter 7 case. Id. at 611. Lost wages and medical expenses arising post-petition are not reachable by the bankruptcy estate.

CONCLUSION

For the reasons stated above, the Debtors respectfully request that the Trustee’s objection to the Debtors’ exemption be denied except as to special damages arising prior to the Debtors’ petition.

Dated: 10/07/2004

CHRISTIAN & PETERSON, P.A.

By: /e/ Kevin Siefken
Kevin H. Siefken
Attorney ID No.: 260745
314 South Broadway Ave.
Albert Lea, MN 56007
(507) 373-2345
Attorneys for Debtors

**United States Bankruptcy Court
District of Minnesota**

Case No: 04-34681

Chapter: 7

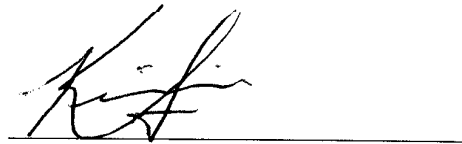
IN RE: James and Linda Augustin
Debtor(s)

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true copy of the following document(s):

- 1) Response to Objection to Property Claimed Exempt
- 2) Affidavit of James Augustin
- 3) Memorandum in Opposition to Trustee's Objection to Exemption
- 4) Proposed Order

were mailed to all persons at the addresses set forth in the exhibit which is attached hereto, by first class mail, postage prepaid, on this 7th day of October, 2004.



Habbo G. Fokkena
U.S. Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Michael S. Dietz
206 South Broadway, Suite 505
P.O. Box 549
Rochester, MN 55903

James and Linda Augustin
905 5th Avenue NW
Austin, MN 55912

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:

Case No.: 04-34681

Chapter: 7

James E. and Linda L. Augustin,

Debtors

ORDER

This Chapter 7 case came on before the Court on October 20, 2004, for a hearing on the trustee's objection to the Debtor's claimed exemption, as amended on October 7, 2004, of the following property: Personal injury claim against Annett Holdings, Inc. d/b/a Best Inns & Suites. Based upon the submissions before the Court, and arguments of counsel, if any:

IT IS HEREBY ORDERED AND DETERMINED:

1. The debtors' amended exemption does not exempt the right to receive payment for items of damage existing pre-petition of the following types: existing medical costs; actual lost income; existing non-medical costs and expenses; and property lost, damaged or destroyed in the incident that caused the injury, and Debtor's interest in these items of damage are not exempt. See In Re: Bailey, 84 B.R. 608 (Apr. 8, 1988); Medill v. State of Minnesota, 477 NW 2d 703 (Minn. 1991).
2. The Trustee's objection is denied as to all other items of damage, and the Debtors' interest in the remainder of said claim is exempt.

Dated: _____

BY THE COURT

Dennis D. O'Brien
United States Bankruptcy Judge